No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,
Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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This brief *amicus curiae* in support of petitioners is submitted with the written consents of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS

Mid-America has an interest in the disposition of this case, which is before this Court on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The Foundation was organized to support the public interest in preserving the economic and political freedoms of our democratic society. The case before the Court presents an important question of both personal and property rights.

SUMMARY OF ARGUMENT

According to the standards promulgated by this Court in leading constitutional and Title VII cases, the findings of "discrimination" made by the Jackson School Board in the present case are inadequate to justify its initation of a race-based system of teacher layoffs. The facts of this case do not present any justification for adoption of minority preference on the basis of past constitutional or statutory violations, evidence of historical discrimination, or the existence of substantial, conspicuous or chronic minority underrepresentation on the Jackson instructional staff.

In addition, the Jackson School Board's layoff of senior nonminority teachers on the basis of race in order to avoid reduction in the percentage of minority faculty violates Title VII as construed by this Court, because such action unnecessarily trammels nonminorities' interests in retaining their jobs.

Finally, petitioners have a statutorily created property right in their seniority. Both the Michigan Civil Service statutes and Title VII foster expectations in seniority and protect seniority systems from claims of discrimination. The Jackson layoff provision takes this property right in seniority from the petitioner without due process or just compensation in violation of the Fifth and Fourteenth Amendments.

ARGUMENT

I. The Findings of "Discrimination" in this Case are Inadequate to Justify Adoption of a Voluntary Racial Preference Under Either the Constitution or Title VII.

Although neither *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) nor *Fullilove v. Klutznick,* 448 U.S. 448 (1980) specifies definitive principles for determining what circumstances justify an employer's adoption of minority preferential "affirmative action", guidance may be taken from the views expressed by individual members of the Court in these cases. In *Bakke,* Justice Powell stated that "[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 310. In the same case Justices Brennan, White, Marshall and Blackmun indicated that they found no constitutional objection to preferential treatment of minority individuals where a review of findings by a body competent to act in this area reveals "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities." *Id.* at 362.

In *Fullilove,* Chief Justice Burger, joined by Justices White and Powell, concluded that the Fourteenth Amendment permitted *Congress* to employ remedial racial criteria where an "abundant historical basis" existed from which the congressional finding of past discrimination in federal procurement could be adduced. 448 U.S. at 478. In addition to these constitutional tests, a majority of the Court has agreed that Title

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[1] Section 703(a)(1) of the Act, 42 U.S.C. § 2000e-2(a)(1) (1978), provides in pertinent part that "[i]t shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or

(Footnote continued on following page.)

VII of the Civil Rights Act of 1964[1] does not necessarily prohibit private employers from initiating voluntary affirmative action programs designed to remedy a "conspicuous racial imbalance in traditionally segregated job categories." *United Steelworkers of America v. Weber,* 443 U.S. 193, 209 (1979).

The Jackson School Board's race based preferential layoff provision at issue in the present case cannot pass muster under any of the above tests. Clearly, the plan cannot be justified under the "past violation" standard employed by Justice Powell in *Bakke.* There has never been any determination that employment practices in the Jackson school system have violated the Constitution or any federal statute. *See Wygant v. Jackson Board of Education,* Pet. Cert. App. 20, 546 F.Supp. at 1198. Just as clearly, the present program cannot meet the abundant historical basis and special competence of Congress criteria alluded to by the Chief Justice in *Fullilove.* Neither the circuit court opinion in this case nor any submission by the parties makes reference to any history of racial discrimination in Jackson's schools. The district court refers only to a single instance of "race tensions" at the Jackson High School in February, 1972. Pet. Cert. App. 20, 546 F.Supp. at 1198. This contrasts sharply with the extensive hearings and debates detailing "historic practices that have precluded minority businesses" from the public contracting process that this Court upheld as sufficient justification for congressional fashioning of race conscious remedies in *Fullilove.* 448 U.S. at 461. Further, the Jackson program cannot withstand scrutiny under the abovementioned underrepresentation and impeded access test articulated in *Bakke.* The record reveals that between 1969 and 1971 the percentage of minority faculty more than doubled while the minority student population remained roughly con-

(Footnote continued from preceding page.)

to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ."

stant. Pet. Cert. App. 21a, 41-42a. Thus there is no evidence that any minority underrepresentation on the Jackson faculty was "chronic", or that the access of minorities to teaching jobs was impeded.

In addition, the Jackson preferential teacher layoff plan patently fails to satisfy the *Weber* Title VII measure of the legitimacy of need for affirmative action. The program upheld in *Weber* sought to remedy an imbalance between the percentage of blacks in a metropolitan labor pool (39%) and the percentage of black craftworkers in a particular Kaiser Aluminum plant (1.83%)—a ratio of 21.3 to 1. 443 U.S. at 198-99. In the present case, the School Board seeks to justify its layoff policy as a remedy for imbalance (in 1971 figures) between the percentage of minority (Black, Native American, Latino, and Asian American) students (15.9%) and the percentage of minority faculty (8.5%) in the Jackson system—a ratio of 1.87 to 1. *See* Pet. Cert. App. 21a, 41a. This latter ratio certainly cannot qualify as "conspicuous" in comparison to the "*manifest* racial imbalance" present in *Weber.* 443 U.S. at 208 (emphasis added). As for the second prong of the *Weber* test, the record does not contain one iota of evidence regarding segregation in the teaching profession. This case simply does not present any conspicuous racial imbalance in a traditionally segregated job category. Therefore, there can be no justification consistent with Title VII for the Board's adoption of a discriminatory "remedy" for a problem that does not exist.

The history of the present case contrasts starkly with the typical cases where courts have upheld voluntary affirmative action on the basis of unambiguous, clearly documented findings of a need to remedy egregiously discriminatory situations. For example, in *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), *cert. denied* 104 S.Ct. 703 (1984) the Sixth Circuit sustained a minority preferential hiring and promotion scheme initiated by the city Board of Police Commissioners to remedy "the *severe* statistical disparity" (in 1967 figures) between black representation in the Detroit Police Department (5%)

and in the community at large (40%). 704 F.2d at 889 (emphasis added). Although the court determined that the Board was correct in finding that the police department had employed "a consistent, overt policy of intentional discrimination against blacks in all phases of its operations," *Id.* at 888, its decision was not based upon evidence of the statistical disparity alone. Rather, the court reviewed the voluminous evidence presented at trial in the district court—which included departmental duty assignments from the 1960's showing the segregation of black and white squad cars and the exclusion of black patrolmen from white neighborhoods, history of a white officers' strike protesting departmental integration, specific testimony regarding exclusion of blacks from a meaningful role in the department, and corroborative studies by the Michigan Civil Rights Commission, the National Advisory Commission on Civil Disorders, and the President's Crime Commission, *Id.* at 889-90—to conclude that ["i]t is in cases like this one . . . *where the facts so clearly establish* the presence of calculated, prior discriminatory practices, that the need for such remedial programs is most acute." *Id.* at 901 (emphasis supplied). Clearly, the Jackson situation is wholly different from that involved in cases like *Bratton.*

The Jackson School Board, unlike the Detroit Board of Police Commissioners, has never made findings of past discrimination of any kind. Nor does the Jackson plan seek to remedy "severe" minority underrepresentation on its instructional staff: underrepresentation is significantly less among Jackson teachers than it was among the Detroit policemen in *Bratton.* Finally, in the present case, neither the School Board, nor any reviewing court—in sharp contrast to the history of *Bratton*—has made any findings to justify adoption of racial preferences other than the bald fact of a statistical disparity between percentages of minority teachers and students in the Jackson schools.

As one federal circuit has recently concluded in a situation factually similar to the case at bar, the existence of bald

percentage disparity is simply not adequate justification for the adoption of a procedure which unfairly discriminates against nonminorities because of their skin color. *Janowiak v. City of South Bend,* 750 F.2d 557 (7th Cir. 1984). In *Janowiak,* an unsuccessful white fire department applicant brought constitutional and Title VII challenges against a minority preferential hiring program initiated by the South Bend Board of Public Safety. The district court upheld the program, but the Seventh Circuit reversed. The Board had sought to justify its imposition of minority hiring quotas on the ground that the minority composition of the city (14.1%) was not reflected in minority representation in the police and fire departments (5.3%)—an underrepresentation ratio of 2.66 to 1. 750 F.2d at 528. That ratio is larger than the ratio in this case. However, the court of appeals analyzed this Court's leading constitutional and Title VII decisions, and concluded that "evidence of statistical disparity alone failed to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against nonminorities." *Id.* at 564.

To conclude, if reverse discrimination is to be tolerated in our society, it should only be accepted in cases where it is necessary to remedy a manifestly wrongful situation, as in *Weber* or *Bratton.* The present case, however bears little resemblance to these types of cases. The School Board plainly had no sound basis on which to discriminate between teachers of different races. The Jackson layoff plan satisfies none of the criteria this Court has previously formulated to allow deviation from our society's general rule of nondiscrimination. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Regents of the University of California v. Bakke,* 438 U.S. at 291. The discriminatory layoff practice involved in this case, adopted only to balance a set of racial statistics in the Jackson school system and not to remedy the effects of any vestige of past or present wrong, cannot be justified under exacting examination. Accordingly, the judgment of the circuit court should be reversed.

II. Even if the Facts of This Case Justified Some Voluntary Affirmative Action, the Jackson Racial Preference in Job Layoffs Violates Title VII.

The landmark Title VII case in the area of voluntary affirmative action is *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), which held that Title VII does not always prohibit a private employer from voluntarily adopting a minority preferential affirmative action plan designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209. In *Weber* the Court upheld a collective bargaining agreement between the United Steelworkers and Kaiser Aluminum which provided for the preferential training of unskilled minority production workers to fill skilled craft positions. There was no evidence that either party to the agreement had ever engaged in racial discrimination, but it was found that at one particular plant only five craft workers out of 273 (1.83%) were black, although blacks comprised 39% of the local work force. To remedy this conspicuous imbalance, the agreement provided that production workers were to be admitted to a new training program on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black craftworkers in the plant approximated the percentage of blacks in the labor market. In denying relief to white production workers who claimed that the agreement violated their right to equal employment opportunity under Title VII, the *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. Implicit in the Court's analysis, however, was the balancing of society's interest in remedying *gross racial imbalances* in the workplace against affected nonminority individuals' expectations of equal opportunity. *Cf. Lehman v. Yellow Freight Systems, Inc.,* 651 F.2d 520 (7th Cir. 1981).

In pursuing this balancing approach, *Weber* identified a number of factors relevant to the determination of a voluntary

plan's Title VII acceptability. Although the Court did not explicitly depict any of these factors as determinative, it did find all of them to be present in Kaiser Aluminum's plan. It thus seems likely that while the absence of any single factor is not necessarily fatal to a voluntary plan, the absence of several, as in the present case, indicates an impermissible remedial program. The key elements in *Weber*'s validation of the Kaiser plan were as follows. First, the plan was voluntary, collectively bargained, of temporary duration, and was designed to "break down old patterns of racial segregation and hierarchy." 443 U.S. at 208. Equally significant, the Kaiser plan did not unreasonably bar advancement of nonminorities because of their race (half of the new craft trainees were to be white), did not require the replacement of nonminorities by minorities, and did not require the maintenance of set percentages of racial representation in Kaiser's workforce, but rather the elimination of manifest racial imbalance. Most importantly, the Kaiser plan did not operate to take away existing expectations of white workers; rather, it established a training program from which neither whites nor blacks had benefited before. In sum, the linchpin of the *Weber* analysis seems to have been that the Kaiser plan did not "unnecessarily trammel the interests of the white employees." *Id.*

The layoff provision at issue in the present case clearly does not meet the criteria set out in *Weber.* A voluntary "affirmative action" *layoff* plan necessarily implies a far greater trammeling of nonminority individuals' interests than was found to be present in the training and *promotion* plan at issue in *Weber.* In *Weber*, white production workers had no vested right to be selected for a training program that did not exist before establishment of the affirmative action plan. Any interest they did have in such a program was diminished because "seniority [was] not in issue [and] the craft training program [was] new and [did] not involve an abrogation of pre-existing seniority rights." 443 U.S. at 215 (Blackmun, J. concurring). Obviously,

the Jackson plan, requiring layoff of tenured nonminority teachers, does abrogate preexisting seniority.

One federal court recently agreed with Justice Blackmun's opinion that a voluntary plan which tampers with ingrained seniority-based expectations presents difficulties not operative in the Kaiser plan validated by *Weber*. In *Hammon v. Barry*, No. 85-0782 (D.D.C. April 1, 1985) the district court sustained a Title VII challenge by white firefighters seeking to invalidate the District of Columbia Fire Department's voluntary affirmative action program. The plan, which mandated the one-time promotion of five blacks and subsequent proportional promotion on the basis of race, was disallowed because it failed to recognize the overriding importance of white firefighters' central expectations that promotion decisions would be based upon seniority and individual achievement. The court stated that:

> [w]hile *Weber* did provide for some degree of permissible 'trammeling' on the interests of white employees, this plan goes much further than did the plan in *Weber*. That case involved a 'quota' for placement of minority workers into a new in-plant craft training program. [443 U.S.] at 199. Because no such program had previously existed, the 'quota' did not deprive whites of rights they had previously enjoyed or of legitimate expectations they had earned. *Here, however, the plan seeks to deprive the white firefighters of a legitimate and long-standing expectation of an equal opportunity to advance into the supervisory ranks, an opportunity they have earned by serving the requisite minimum of five years in the department and scoring well on the promotional examination. The white firefighters have earned the right to expect to be able to reap the rewards of their many years of service and dedication, without having those rewards stripped away solely on the basis of race. Black firefighters have also worked hard, having to overcome a long history of racial prejudice. However, the fact of past discrimination alone is not enough to deprive innocent whites of their legitimate expectation of advancement. Any employee, in the public or private sector, who works hard and fulfills the requirements of his employment, has a legitimate expectation that he or she will be given a fair and equal opportunity to advance, based on merit and achievement. This is not something which can be taken away from him or her just because he or she happens to be of a particular race. As shown above, the plan makes race a mandatory consideration over merit, and thus unnecessarily trammels the interests of white firefighters. Id. at 203.*

Hammon, slip op. at 37 (emphasis by the court). It should be noted that the white teachers' interest unnecessarily trammeled by the agreement in the present case—the sheer retention of their jobs—is even greater than the interest in promotion protected by the *Hammon* decision.

As at least one observer has concluded, any court facing the issue involved in the present case that conscientiously examines the factors this Court found determinative in *Weber* must necessarily conclude that preferential layoff agreements violate Title VII. Note, *Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber, and the Goal of Equal Employment Opportunity*, 15 U. Mich. J. L. Ref. 523, 542 (1982). As the author points out, the only *Weber* criteria preferential layoff systems satisfy are that they result from voluntary collective bargaining and recite a remedial purpose. Beyond this, such systems depart noticeably from the Kaiser plan approved in *Weber*. For instance, advancement of white teachers is hampered to a greater degree under the Jackson plan than was advancement of white production workers under the Kaiser plan. In the latter case each white had access to 50% of the promotions, while in the instant case promotion is impossible for laid off employees. In addition, a preferential layoff plan could contribute to the replacement of nonminority by minority workers, as those laid off may seek alternative employment outside their chosen profession. Further, a plan like the Jackson agreement explicitly provides for maintenance of percentage representation on the basis of race despite *Weber*'s strongly implied disapproval of such arrangements. *Bakke*, of course, directly overturned the establishment of such percentage representation. These observations alone could justify this Court's reversal of the present court of appeals decision approving the Jackson agreement.

This Court explicitly stressed the narrowness of its inquiry in *Weber*, noting that "[t]he only question before us is the narrow statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences *in the manner and for the purpose provided in the Kaiser-USWA plan.*" *Id.* at 200 (emphasis supplied). Given this caveat, it would seem prudent to recall that nondiscrimination remains Title VII's general rule, and voluntary affirmative action a narrow exception.

Nevertheless, the circuit court in this case has failed to heed *Weber*'s direction to avoid a broad reading extending its holding to different sorts of voluntary plans covering dissimilar sets of circumstances. *Wygant v. Jackson Board of Education,* Pet. Cert. App. 2, 746 F.2d at 1152. As a result, the circuit court's analysis of *Weber* was too superficial to justify its conclusions; it simply failed to rigorously scrutinize the Jackson plan at issue in light of this Court's analysis of the Kaiser plan involved in *Weber.* For example, the appeals court did not even mention the *Weber* majority's suggested distinction between those plans which merely seek to eliminate manifest racial imbalance and those fashioned to maintain given percentages of racial representation. In addition, the court of appeals measured the legitimacy of the Jackson plan according to the "reasonableness" standard of *Detroit Police Officers' Ass'n. v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981), sustaining it as substantially related to the objective of correcting minority underrepresentation on the Jackson schools' faculty. 746 F.2d at 1157.

As the Sixth Circuit seemed to realize in an earlier case, however, "reasonableness" *per se* was not one of the criteria employed by the *Weber* Court in judging the Kaiser plan. *Bratton v. City of Detroit,* 704 F.2d 878, 884-85 (6th Cir. 1983), *cert. denied,* 104 S.Ct. 703 (1984). Finally, not only did the court of appeals apply a test not mentioned in this Court's

authoritative voluntary affirmative action precedent, it also failed to address the policy issues implicated in an extension of *Weber,* which involved somewhat peculiar affirmative action promotion measures, to cover a system of race-based preferential layoffs.

In conclusion, *Weber* validated the practice of voluntary affirmative action only in certain narrowly circumscribed circumstances; specifically, where such action does not unnecessarily trammel the interests of affected nonminorities. Nonminority individuals possess vastly greater interests in the retention of their jobs than in being trained for promotion or indeed, in obtaining a particular job in the first place. The court of appeals in the present case misapplied *Weber* and failed to attach sufficient weight to this crucial nonminority interest abrogated by the Jackson layoff policy. Recognition of the proper magnitude of this interest, in accord with the principles of *Weber* and of Title VII itself, mandates the nullification of Jackson's discriminatory program and the reversal of the circuit court's decision in the present case.

III. Petitioners have a Property Right in their Seniority, and the Jackson Layoff Provision Takes That Property Right in Violation of the Fifth and Fourteenth Amendments.

The individual's property right in continued employment and seniority is created by state and federal law. Decisions of this Court have recognized and protected this right. As a property right, seniority cannot be taken from the individual without due process and just compensation. U.S. CONST. amends. V, XIV.

Recently, this Court recognized the existence of property rights in continued employment. *Cleveland Board of Education v. Loudermill,* 53 U.S.L.W. 4306 (U.S. March 19, 1985). In *Loudermill,* this Court discussed the basis of the individual's property interest in his employment and quoted with approval from *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972):

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions

> are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Loudermill went on to hold that the respondent possessed a property right in his continued employment since the Ohio Civil Service Statute classified him as a "civil service employee" entitled to retain his position "during good behavior and efficient service," who could not be dismissed "except for . . . misfeasance, malfeasance, or nonfeasance in office." *Id.* at 4306 (citing Ohio Rev. Code Ann. § 124.34 (1984)). This Court determined that the statutory language fostered employee expectations and thus created the property right. *Id.*

In the instant case, the language of the Michigan Civil Service and Retirement Statute creates property rights comparable to those recognized in *Loudermill.* M.C.L.A. § 38.1 *et seq.* (1967).[2] Specifically, the Teacher's Tenure Act, M.C.L.A. § 38.71 *et seq.* (1967), was enacted for the purpose of protecting teachers from being discharged or demoted from continuing tenure except for reasonable and just cause. *Rehberg v. Board of Education of Melvindale,* 330 Mich. 541, 48 N.W.2d 142 (1951). Not only does the statute create a property right in continued employment, but it protects this right from alienation by explicitly stating that "no teachers may waive any rights and privileges under this act in any contract or agreement made with a controlling board." M.C.L.A. § 38.172 (1967).

The essential component of this property right is the individual's expectations of continued employment established by his or her seniority. The use of seniority systems in America developed from a need to protect these expectations, and today such systems are included in over two-thirds of collective bargaining agreements. U.S. Bureau of Labor Statistics, Dep't.

[2] M.C.L.A. § 38.101 provides in pertinent part that "discharge or demotion of a teacher . . . may be made only for reasonable and just cause. . . ."

of Labor, Bill No. 1888, "Characteristics of Major Collective Bargaining Provisions" (1974). "Seniority rights are essential in allocating job benefits and underscore the importance of the expectations workers have built during their length of service." Note, *Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber and the Goal of Equal Employment Opportunity,* 15 U. Mich. J. L. Ref. 521, 540 (1982). Furthermore, as one article points out seniority is the most valuable "capital asset" an employee can accumulate. Summers and Love, *Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession,* 124 U. Pa. L. Rev. 893, 903 (1976).

The Michigan statutes recognize the validity of the "right to seniority" as well, and reflect Title VII's insulation of seniority systems from claims of discrimination. Specifically, section 37.2211 of the Michigan Civil Rights Act expressly exempts different terms, conditions or privileges of employment pursuant to a bona fide seniority system from the Act's general prohibition of discriminatory treatment of employees. Elliot-Larsen Civil Rights Act, M.C.L.A. § 37.2101 *et seq.* (1977 Supp.). Moreover, the Michigan Civil Service statute mandates that for the purpose of promotion, "seniority shall be controlling" where other factors are equal. M.C.L.A. § 38.461. This preferential treatment of seniority by the Michigan statutes furthers public employees' expectations built up by their seniority status.

The individual's property right in seniority is also protected by specific provisions of Title VII. This is supported by the legislative history of Title VII as well as this Court's decisions which protect the seniority right.

Title VII on its face recognizes the validity and importance of the seniority system. Section 703(h) allows for different treatment of employees pursuant to a bona fide seniority system.[3] This exception to Title VII's general prohibition of

[3] Section 703(h) of the Act, 42 U.S.C. § 2000e-2(h) (1978), provides in pertinent part that "it shall not be an unlawful employ-

(Footnote continued on following page.)

different treatment of employees acknowledges that the individual's property right to bona fide seniority outweighs any countervailing group interest in uniform treatment.

In addition, the legislative history of Title VII makes clear that the 1964 Civil Rights Act was not to interfere with, or even to permit interference with seniority rights. *See, e.g.,* 110 Cong. Rec. 6566 (remarks of Senator Clark) ("Title VII does not permit interference with seniority rights of employees or union members."); 110 Cong. Rec. 7213 (memorandum prepared by Senators Clark and Case) ("Title VII would have no effect on seniority rights . . . [the employer] would not be obliged—or indeed permitted, to give [Negroes] special seniority rights at the expense of white workers."); 110 Cong Rec. 7207 (remarks of Senator Dirksen) ("[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct."). The legislators recognized the individual's seniority right and labored to insulate this right from Title VII requirements.

This Court has acknowledged the "overriding importance" of an individual's interest in seniority when reviewing claims of Title VII violations. *American Tobacco Company v. Patterson,* 456 U.S. 63, 71 (1982) (citing *Humphrey v. Moore,* 375 U.S. 335, 346 (1964)). More significantly, in a 1977 landmark decision, this Court upheld a seniority system even though such a system perpetuated the effects of past discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). In *Teamsters,* the Court recognized the importance of the seniority system and emphasized that seniority systems, unlike other employment practices which may perpetuate the effects of past discrimination, do not violate Title VII if they are "bona fide" within the meaning of section 703(h). *Id.*

(Footnote continued from preceding page.)

ment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ."

at 352. This Court described seniority rights as "vested," and reasoned that Title VII does not require abrogation of such "vested" rights notwithstanding their disproportionate impact on minorities. *Id.* at 353.

The layoff provision in the present case directly infringes on the petitioners' "vested" right in their seniority. Petitioners' claim of unlawful deprivation of these rights is supported by the recent line of cases headed by *Firefighters Local Union No. 1784 v. Stotts,* 52 U.S.L.W. 4767 (U.S. June 12, 1984), which protect seniority rights at the expense of some affirmative action plan.

In *Stotts,* the city of Memphis entered into an agreement, embodied in a consent decree, which attempted to increase the proportion of minority-group representation in the city fire department. Subsequently, the city announced layoffs of employees for economic reasons. The district court modified the consent decree to enjoin the city not to decrease the percentage of employees who were black, despite the city's seniority system. Consequently, some nonminority employees with more seniority than minority employees were laid off. The Sixth Circuit Court of Appeals approved the modification of the decree.

This Court reversed the decision and said that the appeals court overstated the authority of the district court to disregard a seniority system. 52 U.S.L.W. at 4770. The court stressed that Title VII does not authorize judicial imposition of quota remedies to benefit minorities at the expense of whites, and asserted that "mere membership in the disadvantaged class is insufficient to warrant a seniority award." *Id.* at 4772.

This Court refused to allow interference with seniority based layoffs in *Stotts,* even at the expense of undermining an uncontested remedial hiring provision which was enacted subsequent to a finding of past discriminatory hiring practices. In the instant case, the record reveals no finding of the existence of such practices. Therefore, the Jackson School Board has even less justification to circumvent seniority rights in a layoff provision than did the unsuccessful respondents in *Stotts.*

Lower courts have cited the *Stotts* ruling to protect seniority rights threatened by minority preferential employment practices. For instance, one federal district court reversed its earlier ruling and ordered compensation to white firefighters who were required to forfeit seniority as a result of an affirmative action plan embodied in a consent decree. *Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service,* 588 F.Supp. 716 (D.N.J. 1984). Another federal district court also reversed itself following the *Stotts* decision. That court dissolved a permanent injunction against the layoff or demotion of minority-group employees. *United States v. City of Cincinnati,* 35 FEP Cases (BNA) 676 (S.D. Ohio 1984).

Courts have distinguished *Stotts* to uphold rights acquired through affirmative action only in situations concerning *hiring* or *promotion* schemes. *See, e.g., NAACP v. Detroit Police Officers Ass'n,* 591 F.Supp. 1194 (E.D. Mich. 1984); *Van Aken v. Young,* 750 F.2d 43 (6th Cir. 1984) (promotion plan, unlike the plan in *Stotts,* did not deprive employees of vested seniority rights); *Vanguards of Cleveland v. City of Cleveland,* 753 F.2d 479 (6th Cir. 1985) (promotion plan upheld because it "plainly does not interfere with any seniority rights"). These courts have made the crucial distinction between legitimate affirmative action plans to hire and promote, and unconstitutional plans which, in the layoff context, unjustifiably attempt to deprive nonminorities of vested property rights in seniority.

In the present case, the circuit court ignored this important distinction. The minority preferential plan at issue involves layoff procedures which would favor minority employees with less seniority than nonminority employees, a practice clearly foreclosed by the reasoning of *Stotts* and its progeny. Nevertheless, the court of appeals in the case at bar distinguished *Stotts* by emphasizing that the Jackson plan was "voluntary". The court made this distinction without acknowledging that there is no evidence *petitioners* volunteered this abrogation of their seniority rights.

Property rights under the Fifth Amendment are expectancies or interests related to a thing. *United States v. General Motors Corp.,* 323 U.S. 373 (1945). The present petitioners' expectancies were of job security and continued employment due to their seniority. The layoff provision in the collective bargaining agreement was a "taking" of their property rights in seniority since the effect of the provision was to lay off nonminority teachers with greater seniority than minority teachers who were retained.

The Due Process Clause of the Fourteenth Amendment provides that certain substantive rights—life, liberty, and property—cannot be taken except pursuant to constitutionally adequate procedures. *Loudermill,* 53 U.S.L.W. at 4307. Due process requires at least some sound basis for remedial action before a discriminatory plan may be adopted. (See Argument Section I). In the present case, the Jackson plan exhibits no such basis. Therefore, the layoff provision violates the Fourteenth Amendment by depriving petitioners of their rights to seniority without due process.

In addition, even if the Jackson Board had a valid public purpose in not diminishing its percentage of minority teachers, the layoff provision is a violation of those portions of the Fifth and Fourteenth Amendments which prohibit the taking of private property for a public use without just compensation. *Chicago, Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 236 (1897). One court has noted that

> [s]eniority rights are property rights, which when taken, must be paid for, just as private property must be paid for when taken.

Vulcan Pioneers, Inc. v. New Jersey Department of Civil Service, 588 F.Supp. 716 (D.N.J. 1984). The layoff provision in the instant case provides for no remuneration or assurances of call back once an individual has been laid off. It simply is a taking of petitioners' property in their seniority, without compensation.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded for proceedings consistent with the rights of the petitioners.

Respectfully submitted,

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